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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. ...73-1991

CITY OF NAPLES,

Petitioner,

vs.

THE PREPAKT CONCRETE COMPANY and AMERICAN EMPLOYERS' INSURANCE COMPANY,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

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Cases:

Baltimore Contractors, Inc. v. *Bodinger*, 348 U.S. 176 (1955) 4, 5

County of Middlesex v. *Gevyn Construction Corp.*, 450 F.2d 53, cert. den. 405 U.S. 955 (1971) 3

Enelo v. *New York Life Insurance Co.*, 293 U.S. 379 (1935) 5

Farr & Co. v. *Cia Intercontinental de Navigacion*, 243 F. 2d 342 (2 Cir. 1957) 7

La Nacional Platanera v. *North American Fruit and Steamship Corp.*, 84 F. 2d 881 (5 Cir. 1936) 3

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Statutes:

9 U. S. C. § 4 ..... 3, 5, 6, 9, 10

9 U. S. C. § 9 ..... 8, 9, 10

28 U. S. C. § 1291 ..... 3, 4, 5, 10

28 U. S. C. § 1292(a)(1) 2, 4, 5

Other Authority:

14 Moore's Federal Practice 1481 ¶ 0.160[2.-2] 2

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Respondents respectfully submit that the Petition for Writ of Certiorari should be denied in all respects since it is clear from the opinion of the United States Court of Appeals for the Fifth Circuit, as amended and from the authorities cited therein, that there are no inconsistencies or conflicts, inherent or otherwise, among any of the several circuits or in this honorable court in respect of the "same point of law" which is the subject of the decision of the Fifth Circuit Court of Appeals.

Respondents do not contest the statements contained in the petition concerning the alleged grounds on which the jurisdiction of this court is invoked, nor the time factors upon which such alleged jurisdiction rests.

Similarly, Respondents believe that the petition fairly sets forth the applicable Federal statutes involved with the possible exception of 28 U.S.C. § 1292(a)(1) (1970), which provides as follows:

> § 1292. Interlocutory decisions
>
> (a) The courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

Respondents also believe that the petition sets forth a fair statement of the case and facts with the exception of the inaccuracies and omissions hereinafter referred to.

Respondents submit Petitioner's assertions regarding the jurisdiction of the court of first instance are erroneous. The granting of Respondents' cross-motion to amend their petition for removal was within the sound discretion of the District Court for the Southern District of Florida. If Petitioner took serious issue with the granting of the cross-motion, it could have promptly appealed that court's order of October 21, 1970 and raised the propriety of that portion of the order which denied its motion for remand. See *Willoughby* v. *Sinclair Oil & Gas Co.*, 188 F.2d 902 (10 Cir. 1951); *Mayflower Industries* v. *Thor Corp.*, 184 F. 2d 537 (3 Cir. 1950); 1A Moore's Federal Practice 1481 *et seq.*, ¶ 0.169 [2.-3].

Accordingly, and for the reasons which follow, it is submitted that there are no questions presented for review by this court and the petition should be denied in all respects.

The first question which Petitioner alleges to arise from the Court of Appeals' opinions of February 22 and May 23, 1974 is "whether the Order of the United States District Court, Southern District of Florida, entered on October 21, 1970, granting the contractor's motion to compel arbitration and staying the Court proceedings constituted a final judgment or order or constituted an interlocutory order". It is submitted that Petitioner has gone a long way towards answering this question. In the opening two lines under the heading "Questions presented for review" on page 2 of the petititon, vis:

> "The Petitioner, City of Naples, on May 26, 1970, filed an action at law * * *"

This was an action at law for damages for breach of contract brought in the State court in Florida, and this action at law was thereafter removed to the United States District Court for the Southern District of Florida in which latter court Respondents successfully moved for a stay of the action and an order compelling the parties to proceed to arbitration, as provided under the provisions of 9 U.S.C. § 4 (1970).

It is well settled that the District Court's order entered on motion of one of the parties under 9 U.S.C. § 4 compelling arbitration is appealable as a final order under 28 U.S.C. § 1291. *New England Power Company* v. *Asiatic Petroleum Corporation*, 456 F. 2d 183, 188 (1 Cir. 1972); *County of Middlesex* v. *Gevyn Construction Corp.*, 450 F. 2d 53, cert. den. 405 U.S. 955 (1971); *Standard Chlorine of Delaware, Inc.* v. *Leonard*, 384 F. 2d 304, 308 (2 Cir. 1967); *La Nacional Platanera* v. *North American Fruit and Steamship Corp.*, 84 F. 2d 881 (5 Cir. 1936).

Petitioner seeks to obfuscate the facts involved herein by referring to certain dicta appearing in the decision of the United States Court of Appeals for the 1st Circuit in the case of *New England Power Company* v. *Asiatic*

Petroleum Corp., supra, in its reference to (456 F.2d at p. 189) "Byzantine peculiarities of this area of the law * * *".

Clearly, the whole area of law under discussion in the *New England Power Company* v. *Asiatic Petroleum Corp.,* case, *supra,* was the determination of whether the District Court's denial of the plaintiff-appellant's motion for a stay of arbitration and a granting of the defendant-appellee's motion for a stay of court proceedings pending arbitration was a final order within the meaning of 28 U.S.C. § 1291, in an action where the original underlying relief sought was equitable in nature, rather than an action at law. The "Byzantine peculiarities" referred to by the First Circuit Court of Appeals emanated from circumstances in which, unlike the present circumstances, equitable relief was demanded and the distinctions which were thereby made prior to the merger of law and equity and which precedents are still adhered to by this court as "better judicial practice * * * leaving Congress to make such amendments as it may find proper." *Baltimore Contractors, Inc.* v. *Bodinger,* 348 U.S. 176, 185 (1955). The distinctions, however, only concern cases in which the underlying relief sought is equitable in nature. In the instant matter, Petitioner's underlying action in the Florida State Court was an action at law for damages, and accordingly cannot be saved by the luxury of "impalement" which Petitioner gratuitously or be it erroneously, attributes to the decision of the Circuit Court of Appeals.

Petitioner's reliance on the cases of *Shanferoke Coal & Supply Corporation* v. *Westchester Service Corporation,* 293 U.S. 449 (1935), and *Schoenamsgruber* v. *Hamburg American Line,* 294 U.S. 454 (1935), in support of its contention that the October 21, 1970 order of the Southern District Court of Florida was not a final order, is wholly misplaced and demonstrates Petitioner's lack of comprehension of the significance of 28 U.S.C. § 1292(a)(1), ". . . which makes an exception to the requirement of

finality, permitting appeals from interlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.'" (*Baltimore Contractors, Inc.* v. *Bodinger, supra,* 348 U.S. 176 at p. 180). While it is true that this court held, in *Shanferoke,* that the order of the District Court denying the stay was not a final judgment appealable under Sec. 128 of the Judicial Code (now 28 U.S.C. § 1291), it was, even though interlocutory, appealable to the Circuit Court of Appeals under Sec. 129 of the Judicial Code (now 28 U.S.C. § 1292(a)(1)), only if the denial of the stay should be deemed the denial of the injunction (i.e., within the exception to the requirement of finality). This court found that the order was appealable under Sec. 129 of the Judicial Code, following the reasons set forth in this court's decision in *Enelo* v. *New York Life Insurance Co.,* 293 U.S. 379 (1935). Admittedly, as Petitioner concedes on p. 14 of the petition, this court in the *Shanferoke* decision did not consider the specific question of whether an order compelling the parties to proceed to arbitration, as provided for in 9 U.S.C. § 4 is a final order. It is submitted that the overwhelming weight of authority, as recognized by the decision of the Court of Appeals herein, and concerning which there is clearly no conflict among the Circuits, is that such an order is a final order.

Likewise, the case of *Schoenamsgruber* v. *Hamburg American Line, supra,* is of no avail to Petitioner's contention, and indeed, is distinguishable from the facts involved in the instant matter. As was pointed out by the decision in *The Sydfold,* 25 F. Supp. 662 (S.D.N.Y. 1938), at pp. 662-663:

> "... an order granting a petition to compel arbitration has been held final and hence appealable under section 128 of the Judicial Code, 28 U.S.C.A. § 225 [citing cases] . . .

> There is nothing to the contrary in *Schoenamsgruber* v. *Hamburg American Line*, . . . There the libellant had brought a libel in rem against the vessel and in personam against the owner. The owner demanded relief under an arbitration clause. The district court made an order directing arbitration, staying the trial of suit *and retaining jurisdiction to make further orders and decrees.* It was held that the order was not final. The order, it will be noted, was not the usual one under section 4, made in an independent proceeding for arbitration. It was an order under section 8, which is to the effect that in a case cognizable in admiralty a party claiming to be aggrieved may begin proceeding by libel and seizure of the vessel or other property in the usual way, and the court shall then have jurisdiction to order arbitration and shall retain jurisdiction to enter decree on the award. The purpose of section 8, 9 U.S.C.A. § 8 is to allow an aggrieved party the benefit of security obtained by attachment; to achieve this end, the arbitration is made a phase of the suit in admiralty. The order in the Schoenamsgruber Case, by its terms as well as by section 8 of the Act, 9 U.S.C.A. § 8, was plainly an interlocutory order."

The second question which Petitioner alleges to arise from the decision of the Court of Appeals herein is whether the United States District Court for the Southern District of Florida has jurisdiction and venue in the pending cause or whether such jurisdiction and venue is vested in the United States District Court for the Northern District of Ohio.

In its decision of February 22, 1974, the Circuit Court of Appeals very properly held that the provisions of Section 4 of Title 9 concerning the proper locale for an arbitration hearing compelled by a Federal court is analo-

gous to a venue provision, and thus is waivable. *Farr & Co.* v. *Cia Intercontinental de Navegacion,* 243 F. 2d 342 (2 Cir. 1957).

Petitioner states in its "Statement of Case and Facts," p. 9 of the petition, that arbitration hearings were commenced in Cleveland, Ohio "over the venue objection of the City . . ." but not the objection belatedly raised on appeal but simply on grounds of convenience. As the Circuit Court of Appeals herein correctly notices (footnote 1 in its decision of February 22, 1974), the arbitration agreement between Petitioner and Respondent, Prepakt Concrete Co., gave the American Arbitration Association the power to determine locale in cases of disagreement. In footnote 5 of the same decision, the Circuit Court of Appeals correctly observed that both parties had thereby surrendered the choice of locale to the AAA. Thus the court correctly concluded that "by agreeing in an arms length commercial contract to abide by the AAA's decision as to arbitration locale in cases of dispute, see note 1, supra, the City waived its right to oppose an Ohio locale" (Petition, Appendix p. 5).

The fact of the matter is that the only venue objection that the Petitioner made to an arbitration hearing in Cleveland, Ohio was to the American Arbitration Association, which objection resulted in the "disagreement" between the parties as to the locale of the arbitration, thereby empowering the AAA to determine the locale. No venue objection was ever raised by the Petitioner in the United States District Court for the Southern District of Florida. Instead, Petitioner joined the issues in the arbitration proceedings and thereafter participated in the arbitration hearings until their completion. It was only after Respondent, The Prepakt Concrete Co., filed a motion, on June 19, 1972, seeking confirmation of the arbitration award in the United States District Court for the Northern District of Ohio, Eastern Division, that the Petitioner, on

August 15, 1972, filed with the Florida District Court its various motions which were the subject of the order of the Florida District Court dated December 6, 1972 and from which the Respondents appealed to the Circuit Court of Appeals herein, and which order the Circuit Court of Appeals herein properly vacated.

A fact which the Petitioner omitted to state in its "Statement of Case and Facts" is that after Respondent, The Prepakt Concrete Company moved, on June 19, 1972 to confirm the arbitration award in the Northern District Court of Ohio, the Petitioner herein appeared in that action and objected to confirmation on the ground that the Northern District Court of Ohio lacked jurisdiction to confirm the award. It was upon this jurisdictional issue that a memorandum and order was entered in the United States District Court for the Northern District of Ohio, Eastern Division on December 18, 1972. A copy of this memorandum and order is attached in the appendix hereto.

It is abundantly clear, as was properly held in decision of the Circuit Court of Appeals herein and as concurred in by the memorandum and order of the United States District Court for the Northern District of Ohio of December 18, 1972 that under Section 9 of Title 9, U.S.C., the Ohio District Court was the proper court to confirm, vacate, modify or correct the arbitration award, *Reed & Martin Inc.* v. *Westinghouse Electric Corp.*, 439 F.2d 1268, 1276-1277 (2 Cir. 1971). As the Circuit Court of Appeals correctly pointed out (Petition, Appendix p. 5):

> "The arbitration hearing had lawfully taken place in Ohio, because of the City's waiver of the § 4 for venue designation. Diversity of citizenship existed and more than $10,000 was in controversy. Therefore, under § 9, the Ohio District Court was the proper court to confirm, vacate, modify or correct the arbitration award."

Of a special significance in this connection is the comment appearing in the memorandum and order of the United States District Court for the Northern District of Ohio dated December 18, 1972, as follows (Appendix herein, p. 12):

> "It might also be noted that were this court to order petitioner [The Prepakt Concrete Company] to seek confirmation in Florida, its order would contravene the express language of 9 U.S.C. § 9. Thus, whether or not sections 4 and 9 contemplate confirmation of the award in the district court in Florida, because jurisdiction and venue exists in this court, and because the agreement provides for confirmation in any court having jurisdiction, the award must be confirmed here."

From all of the foregoing, it is abundantly clear that the Petitioner herein, the City of Naples, Florida, waived its right to oppose to an Ohio locale for the arbitration proceedings and thereafter participated in an arbitration hearing which lawfully took place in Ohio as a result of which an award was rendered in Ohio. And, this set of circumstances brought into play different sections of the Federal arbitration statute, as the decision of the Circuit Court of Appeals herein correctly noted. While the Petitioner may be technically correct, as observed in the decision of the Circuit Court of Appeals, that the Florida District Court retained jurisdiction over the stayed lawsuit (which suit includes a cause of action by the City against the performance bond surety, Respondent American Employers Insurance Company) the Petitioner's failure to raise a Section 4 venue objection in the Florida District Court coupled with Petitioner's appearance in proceeding through the arbitration to its completion and thus bringing into play the provisions of Section 9 of Title 9, all operate to vest jurisdiction and venue in the United States District Court for the Northern District of Ohio.

Conclusion

Respondents respectfully submit that there is no conflict among any of the several circuits on the same point of law which is the subject of the decision of the Circuit Court of Appeals herein, namely, that a Section 4 order compelling arbitration is a final order appealable under 28 U.S.C. § 1291. Moreover, there is absolutely no inconsistency or conflict among the several circuits or in the Supreme Court of the United States that the locale provision of Section 4 of Title 9 is analogous to a venue provision and is, thus, waivable, and there is no inconsistency or conflict among the several circuits or in the Supreme Court of the United States that Petitioner's time for appealing the order compelling arbitration has long since expired and that the Petitioner has lost and waived its right to have the order reviewed. Similarly, there is no inconsistency or conflict among the several circuits or in this court concerning the proper jurisdiction in which to file a motion for an order confirming an arbitration award pursuant to the provisions of Title 9, Section 9, U.S.C. The prior holdings of this court in these specific areas is perfectly clear. The only legal rights of which Petitioner has been deprived are those which Petitioner has voluntarily waived.

Accordingly, it is respectfully submitted that the Petition for Writ of Certiorari to the United States Court of Appeals, Fifth Circuit, be denied in all respects.

Respectfully submitted,

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APPENDIX

[4]

[4] MEMORANDUM AND ORDER

Filed: Dec. 18, 1972

United States District Court
Northern District of Ohio, Eastern Division

The Prepakt Concrete Company,
Petitioner

v. CA No. C 72-641

The City of Naples,
Respondent

THOMAS, J.

Petitioner, The Prepakt Concrete Company, moves this court pursuant to 9 U.S.C. § 9 to confirm an arbitration award of $90,372.35 made by the Cleveland Regional Office of the American Arbitration Association on May 17, 1972. Respondent, City of Naples, Florida, objects to confirmation principally alleging that this court lacks jurisdiction to confirm the award and thus the petition should be dismissed. Pursuant to 9 U.S.C. § 10 respondent also moves this court to vacate and set aside the award because the arbitrators deliberately disregarded and misconstrued the applicable law.

Petitioner, an Ohio corporation, and respondent, a municipal corporation existing under the laws of the

State of Florida, entered into a written contract on May 21, 1969, whereby petitioner agreed to repair the timber piling of a municipal pier located in the City of Naples. The contract contained a provision for arbitration which provided:

> 4.35 *Arbitration*
>
> All claims, disputes, and other matters in question arising out of, or relating to, this agreement or the breach thereof * * * shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining. This agreement so to arbitrate shall be specifically enforceable under the prevailing arbitration law. The award rendered by the arbitrator shall be final and judgment may be entered upon it in any court having jurisdiction thereof.

[5] A dispute arose concerning the performance of the work and on May 26, 1970, without filing any notice of demand for arbitration with petitioner, respondent instituted suit against petitioner and its bonding company, American Employers Insurance Co., in the Circuit Court for the 20th Judicial Circuit, Collier County, Florida. That suit alleged a breach of contract by petitioner. On May 28, 1970, petitioner, complying with the arbitration agreement, filed a notice of demand for

arbitration with both respondent and the American Arbitration Association (herein AAA), designating the "hearing locale" as Cleveland, Ohio. On June 2, 1970, respondent notified the AAA of its objections to arbitration of the dispute in Cleveland, Ohio. AAA deferred decision and allowed respondent until November 16, 1970, to file objections.

On June 22, 1970, petitioner and defendant bonding company jointly removed the City of Naples suit to the United States District Court for the Southern District of Florida. Thereafter, respondent moved to remand; petitioner and defendant bonding company moved to stay the trial of the removed action. On October 22, 1970, the federal district court granted the motions to amend the removal petition, to compel arbitration, and to stay the proceedings. It denied the motion to remand.

On October 27, 1970, AAA was advised by petitioner of the federal district court's decision and requested to proceed with arbitration. The arbitrators found that respondent City of Naples breached the contract "as to representation of material facts regarding conditions of the contract work site and subsequent termination of the claimant's contract."

Paragraph 4.35 of the contract provides that disputes shall be decided "in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining." The rules applicable

at that time (effective March 8, 1966) provided in Section 1 that:

> The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration under the Construction Industry Arbitration Rules.

[6] The contract itself does not designate any locale for arbitration. However, by incorporation of the rules into the contract, the parties did agree on a method for determining the place of arbitration.

Section 9 of the Rules provides:

> Parties to an existing dispute may commence an arbitration . . . by filing in any regional office two (2) copies of a written agreement to arbitrate . . . signed by the parties.

Section 10 provides:

> The parties may mutually agree on the locale where the arbitration is to be held. . . . If a party objects to the locale requested by the other party, the AAA shall have the power to determine the locale and its decision shall be final and binding.

When petitioner selected Cleveland as the site for arbitration and respondent objected, the latter method

of site selection outlined in Section 10 became applicable. Though respondent objected to the situs of the hearing on three separate occasions, the AAA on December 4, 1970, determined that arbitration should be held in Cleveland, Ohio.

The parties did not specify which court should confirm the award but they did agree that "judgment may be entered upon it in any court having jurisdiction thereof."

Title 9 U.S.C. §9 provides, in part,

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award . . . and shall specify the court, then . . . any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified or corrected . . . . If no court is specified in the agreement . . . then such application may be made to the United States court in and for the district within which such award was made.

Since the award was made in this district (Cleveland) and the agreement provided that any court having jurisdiction of the award may confirm it, then petitioner, under the terms of both the agreement and

the statute, must seek confirmation of the award in this court. Unless this court otherwise lacks jurisdiction, the award must be confirmed. 9 U.S.C. § 9.

[7] Relying on 9 U.S.C. § 4, respondent contends that this court lacks jurisdiction to confirm the award because arbitration should have been held within the district of the United States District Court for the Southern District of Florida; and that district court erred in ordering the parties to arbitrate in Cleveland, Ohio. Respondent further contends that because the district court granted a stay, its jurisdiction still exists and, therefore, the petition for confirmation should have been filed there.

Respondent maintains further that this court lacks jurisdiction to confirm the arbitration award because, in its view, 9 U.S.C. § 9 does not contemplate confirmation of an award in a federal district court which is not the same court that ordered arbitration under 9 U.S.C. § 4.

9 U.S.C. § 4 provides in part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States District Court which, save for such agreement, would have jurisdiction under Title 28 . . . of the subject matter of a suit arising out of the controversy between

> the parties, for an ordering directing that such arbitration proceed. . . . The hearing and proceedings, under such an agreement, shall be within the district in which the petition for an order directing such arbitration is filed.

The district court found jurisdiction under Title 28 and its ruling will be accepted here. Notably, respondent admits in its answer that the district court had jurisdiction.

Before proceedings in the state court were instituted, either party to the contract could have moved in any district court for an order compelling arbitration. The statute clearly provides for it. No situs for arbitration having been designated in the contract a choice of forum to compel arbitration was solely dependent upon the parties' choice of a hearing situs. Possibly because it believed that arbitration was unavailable as a remedy respondent instituted suit in the state court.

Acting jointly with the bonding company petitioner voluntarily removed the City of Naples breach of contract action to the federal district court. Instead of filing an application under 9 U.S.C. § 3 for a stay order only (see *Shanferoke Coal & Supply Co. v. Westchester Service Corp.*, [8] 293 U.S. 449 (1935)) petitioner sought to further invoke the power of that federal district court by moving for an order to compel arbitration. Under 9 U.S.C. §4 that United States district court had the power to order arbitration. Under

a further provision of Section 4, "the hearing and proceedings . . . shall be within the district in which the petition for an order directing such arbitration is filed." Thus, the district court could have compelled the petitioner, having filed its motion for an order compelling arbitration, to submit to arbitration proceedings within the Southern District of Florida.

The district court's order did not specify Cleveland, Ohio as the situs of the arbitration, but it may be assumed from the record that this was its intent.[1] But it probably could not have forced arbitration beyond its district. See *Zenol, Inc. v. Carblox, Ltd.*, 334 F.Supp. 866, 870 (W.D. Pa. 1971). Nevertheless the fifth sentence of Section 4, just quoted, is a venue provision. See *Farr & Co. v. Cia. Intercontinental De Navegacion De Cuba*, 243 F.2d 342, 346 (2 Cir. 1957). Hence, the court's order to conduct the arbitration proceedings in Cleveland was not jurisdictionally defective. Because it acquired jurisdiction over the subject matter and over the parties its order and the subsequent arbitration proceedings are not null, void and of no effect.

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[1]The removal petition recites: "This petition for removal is made without prejudice to the right of petitioner . . . to arbitrate and complete such arbitration in a proceeding now pending in accordance with the agreement of the parties and the rules of the American Arbitration Association."
The arbitration proceedings had already been pending approximately 25 days before the removal petition was filed and approximately five months before the court entered its order compelling arbitration. Therefore, it must be concluded that the federal district court in Florida knew of the arbitration proceedings then pending. Moreover, attached to the motion was a letter from the Cleveland Regional Office of the AAA acknowledging respondent's hearing locale objections.

By fixing the hearing locale outside its district, the district court imposed an improper venue. Nevertheless, respondent may not successfully urge that error as a reason for denying confirmation of the award, because it has waived that objection. At the time the motion to compel arbitration was pending respondent could have challenged the court's [9] authority to order arbitration in Cleveland, Ohio. Respondent knew that the situs of the pending arbitration was outside the district of the court. Yet the record does not reveal, nor does respondent here contend, that it brought this venue problem to the court's attention at that time. Thus, it cannot now take advantage of an error which it could have easily avoided by timely making its venue objection in that court. Its inaction contributed to the error. Moreover, after the court ordered arbitration in Cleveland and after respondent made its motions for stay and remand, but prior to the court's November 30th order, respondent never suggested to the district court that it lacked the power to compel arbitration outside its own district. Significantly, at that time (November 30), respondent knew that the AAA had already determined the proper hearing locale to be Cleveland, Ohio. Yet it still did not urge as error that the court's order contravened 9 U.S.C. § 4.

On three separate occasions respondent objected to the AAA that the hearing locale was improper, but it never objected on the ground that the court's order contravened 9 U.S.C. § 4. Under the terms of its agreement determination of the hearing locale by the

AAA is "final and binding" on the parties. Thus, not having suggested to the arbitrators that the district court's order was erroneous it must be deemed to have waived that objection also, even though it did object on other grounds at the time of the hearing. Subject matter jurisdiction was properly vested in the AAA and because of respondent's waiver of the venue objection its decision is also binding on this court. Certainly, respondent cannot contend that it was willing to arbitrate in Florida but for the court's order. Respondent had an equal opportunity to request arbitration and to choose a hearing locale. Instead, it filed suit ignoring its contractual obligation to arbitrate. Hence, respondent cannot claim prejudice upon the ground that arbitration was held in Cleveland, Ohio.

[10] Other reasons underpin a finding that this court should confirm the award. Had respondent considered the order void, prompt review was available. The grant of a stay pending arbitration is analogous to the granting of an injunction, and appellate jurisdiction exists under 28 U.S.C. § 1292(a)(1). *Southeastern Enameling Corp. v. General Bronze Corp.*, 434 F.2d 330, 332 (5 Cir. 1970). See also, *Jackson Brewing Co. v. Clarke*, 303 F.2d 844, 845 (5 Cir. 1962). Thus respondent could have immediately brought the error to the attention of the Fifth Circuit and thereby avoided any possibility of the attendant expense, delay, and inconvenience which accompany the relief it now seeks. The procedure employed by respondent is contrary to the

[10] *Memorandum and Order*

very purpose and intent of arbitration; and the consequences may be irreparable.

Moreover, its time for appeal having long since expired (Rule 73, Federal Rules of Civil Procedure) respondent's contention that should this court confirm the award it would create two appealable decisions from two different courts, loses its persuasive effect. If confirmation of the award creates two appealable decisions from two different courts (because the bonding company was not a party to the arbitration and is a defendant in the stayed action), such result obtains primarily because of respondent's failure to appeal the order that compelled arbitration outside the district. For all practical purposes this order terminated the lawsuit in that court. Compare *Chatham Shipping Co. v. Fertex Steamship Corp.*, 352 F.2d 291, 294 (2 Cir. 1965).

Furthermore, 9 U.S.C. § 9 provides that when no confirming court is specified in the agreement "application may be made to the United States court in and for the district within which such award was made." That [11] clause is likewise a venue provision. Unless waived it must be complied with. Thus, petitioner is correct when it states that "by reason of the fact that the arbitration award was entered in Cleveland, Ohio Prepakt had no alternative but to seek confirmation of that award in this court."

This court recognizes, as respondent contends, that in the absence of an agreement specifying a particular

court, Section 9 does not contemplate confirmation of an award in a district court which is not the same court that ordered arbitration. Sections 4 and 9 of Title 9 are complementary. Absent a hearing locale and confirmation forum designation, the court ordering arbitration will be the one confirming the award. However, where the parties arbitrate outside the district of the court that ordered arbitration and no objection is made on that ground either to the court ordering arbitration or to the arbitrators and no appeal is taken from the orders staying the proceedings and compelling arbitration, then the court whose district encompasses the hearing locale is the proper court to confirm the award. It might also be noted that were this court to order petitioner to seek confirmation in Florida, its order would contravene the express language of 9 U.S.C. §9. Thus, whether or not sections 4 and 9 contemplate confirmation of the award in the district court in Florida, because jurisdiction and venue exist in this court, and because the agreement provides for confirmation in any court having jurisdiction, the award must be confirmed here.

Respondent's representations as to the proceedings that will follow if the award is not confirmed are not clear. However, inferring from the fact that respondent requests this court to set aside the award it can reasonably be concluded that respondent envisages that arbitration proceed again within the Southern District of Florida. Such an order would defeat the pri-

mary purpose of arbitration which is the speedy resolution of disputes. To permit that result would involve a further delay in the resolution of this dispute, added unanticipated expense to the parties, a rehearing before an arbitration panel, another proceeding to confirm the award, [12] and any appeals which may thereafter be taken. Though the court is reluctant to decide this case on the basis of a known waiver of a substantial right (both the appeal and the venue objections), when balanced against the alternative and considered with respondent's lack of diligence, this court can only conclude that the award must be confirmed.

Finally, the cases cited by respondent do not adequately support its position. In *China Union Lines v. Steamship Co. of 1949*, 136 F.Supp. 597 (S.D. N.Y. 1955), libelant moved in a Texas district court to attach respondent's funds and for an order directing arbitration. The court ordered arbitration according to the contract (in New York) but expressly retained jurisdiction to confirm the award. In an action to stay arbitration in the Southern District of New York, the court acknowledged that "the only district within which the arbitration could proceed by force of a petition and court order would be the Southern District of Texas," and that the Texas court's order "contravened the provision contained in the statute [9 U.S.C. § 4]." *China Union Lines, supra* 599. Though the stay was granted the case was not decided on that ground. The *ratio decidendi* was that libelant waived its right to seek arbitration

because of the extent of its activity in the New York court seeking judgment without arbitration.

In *Lesser Towers, Inc. v. Roscoe-Ajax Construction Co.*, 285 F.Supp. 1005 (S.D. Calif. 1966), the central issue was whether a motion to confirm an award brought in a state court and subsequently removed was a separate proceeding from a petition to compel arbitration brought in the same state court and thus was an initial pleading within the 30-day rule for removal. Finding that the motion to confirm the award was not a separate proceeding, the court remanded the case to the state court. Because of that finding the court opined that its authority under Section 9 did not extend to situations in which jurisdiction was in a state court "by virtue of that court having considered and ruled upon initial judicial proceedings in the matter," and where the contract provided for confirmation in the court "having jurisdiction." *Id.* at 1110. The court's opinion seems prompted more by a consideration of federal-state relations that a construction of [13] Section 9. In any event, no question of waiver was presented.

The other cases cited by respondent for the proposition that this court does not have jurisdiction to confirm the award are not helpful. However, one case that it heavily relies on actually supports this court's ruling that the award should be confirmed in the district court where it was made. See *Arthur Imerman*

Undergarment Corp. v. Local 162, 145 F.Supp. 14, 17 (D. N.J. 1956). Compare also *Reed & Martin, Inc. v. Westinghouse Elec. Co.*, 439 F.2d 1268, 1276 (2 Cir. 1971).

Continental Grain Co. v. Dant & Russell, Inc., 118 F.2d 967 (9 Cir. 1949) clearly holds that one who moves for an order compelling arbitration (9 U.S.C. § 4) in a court not within the district where arbitration is to take place, cannot later complain that the court proceeded in accordance with the applicant's request and the statute. This court agrees with such construction, especially on the facts in that case. However, the significant difference between the two cases is that there, arbitration had not then taken place and libelant did not move for an order confirming the award. The facts did not present a question of improper venue or waiver. In the instant case, however, arbitration has been concluded and, because of its failure to object on the ground of improper venue, at the time the district court ordered arbitration or appeal therefrom, respondent waived its right to object to improper venue at the time of confirmation.

Because the issue of this court's jurisdiction to hear and determine petitioner's motion to confirm the arbitration award is deemed separate from respondent's claim that the arbitrators deliberately disregarded the applicable law, this court has first decided the threshold issue. Before considering the arbitration record to determine whether any ground exists for vacating

the award under 9 U.S.C. § 10, the court is filing this memorandum setting forth its findings and conclusions on the jurisdictional issue.

The parties are requested to provide the court with a single copy of the arbitration record, including exhibits.

IT IS SO ORDERED.

/s/ WILLIAM K. THOMAS
United States District Judge